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Book Review. Lone Wolf v. Hitchcock by Blue Clark

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by which to interpret the data. The dances have persisted, although not unchanged in form. Did the laws bring about change in religious practice, or did they bring resistance, such that Indians exercised control over their sacred dances in a period of change? Are the Indians of the period to be seen as undermined by European coercion and factionalized by various forms of Christianity, such that their opposition was ineffective? Or were the religious changes that took place, changes in ritual practices as well as loss of status of ritual practitioners, part of more general adaptive changes in their mode of life, in which the laws actually played only a relatively insignificant part?

In this book, which happens to be one of the better histories of Western Canadian Indians of the contact period, European motives for suppression of ritual are clear; it is the reasons behind the subsequent Indian actions that remain rather elusive.

Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century. By Blue Clark. (Lincoln: University of Nebraska Press, 1994. xiii + 182 pp., preface, chronology, introduction, illustrations, maps, photographs, conclusion, epilogue, appendixes, notes, bibliography, index. \$37.50 cloth.)

David C. Williams, *Indiana University*

In *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress may abrogate treaties with the Indian tribes whenever it chooses and may take their lands without full compensation. *Lone Wolf* is thus a significant chapter in the expropriation of this continent from its indigenous owners. Along with *Dred Scott* and *Korematsu*, the case is one of the low points of judicial protection of minority rights. Blue Clark has now written a case study of this important decision. In this slim volume, he traces the background of Kiowa-U.S. relations, the abrogation of the 1867 Medicine Lodge treaty by Congress, the Supreme Court's acceptance of that abrogation, and the aftereffects of that decision on the Kiowas and other Indian groups.

To those familiar with the case, it is most useful to see the story from beginning to end, told in detail and in context. In particular, we come to know the intriguing personalities that drove this case through litigation: Lone Wolf, the defiant representative of aboriginal Kiowa culture; Indian Agent Randlett, the federal bureaucrat who paternalistically tried to care for his charges but would brook no defiance; Herbert Welsh, the head of the Indian Rights Association, who sought to protect Indian land rights but also to assimilate the tribes; and of course the lawyers—Willis Van

Devanter, Hampton Carson, and William Springer. By tracing the varying agendas of these participants, Clark offers us a fascinating story of the politics of Indian rights at the turn of the century.

Ultimately, however, this book is not about politics but about law, and in particular about one case—*Lone Wolf*. It is therefore unfortunate that Clark's treatment of that case rests on basic legal errors. After Clark's analysis of the case, we still do not know what the Court held, what the exact significance of the holding was, or how that holding differs from present law.

Some background may be helpful. In 1867 the Kiowas and the United States signed the Treaty of Medicine Lodge, setting aside a reservation for the tribe and agreeing that any future cessions of land would occur only with the consent of three-quarters of the tribe's male members. In 1892 the Jerome Commission secured from the Kiowas an additional agreement: the tribal common lands would be allotted to individual Kiowas to be held in fee simple, and the federal government would buy some of the remainder. As Clark describes, the federal government failed to obtain the number of signatures required by the 1867 treaty, and the amount paid for the land was very low. In 1900, Congress adopted this agreement, with modification, as a statute.

The Court in *Lone Wolf* faced two legal issues, not one. First, the Kiowas alleged that the United States could not unilaterally violate its treaties; agreements between nations were binding, just as are contracts between parties (the "Sanctity of Treaty" claim). Second, the United States had recognized Indian title to the reservation in the treaty, so that thereafter the land was protected against government expropriation by the Fifth Amendment to the U.S. Constitution, just as all other land is (the "Just Compensation" claim). Clark never distinguishes between these two claims; he routinely treats the Just Compensation claim as if it were one aspect of the Sanctity of Treaty claim. This conflation causes him to confuse the holding of the case and its significance.

The practical differences between the two claims are many. First, the Just Compensation claim would protect only land rights, whereas the Sanctity of Treaty claim would protect any treaty rights, including sovereignty. Second, the Sanctity of Treaty claim would completely block the United States from taking Kiowa land: by contrast, the Just Compensation claim would require the United States only to pay a fair amount for any land that it chose to take. Clark completely ignores this fact; he seems to assume that if the Kiowas won, they would automatically get their land back. Third, under modern law, the Kiowas would probably win on the Just Compensation claim but lose on the Sanctity of Treaty claim: the federal government

may freely abrogate its government-to-government agreements, but it must pay for land that it takes (see *United States v. Sioux Nation of Indians*, 448 U.S. 371, 410–15 [1980]). Clark asserts that modern legal opinion holds that *Lone Wolf* is “outmoded” (107); in fact, modern legal opinion holds that it is outmoded only as to the Just Compensation rule, not as to the Sanctity of Treaty rule.

Finally, and perhaps most disturbingly, the elision of the two claims causes Clark to misrepresent the Court’s reasoning. Each claim rested on different arguments, considerations, and precedents. On the Sanctity of Treaty issue, the Court held that Congress could violate Indian treaties at whim. It offered two legal reasons, and again Clark never adequately distinguishes between these two grounds. First, according to the Court, Indian affairs were a Political Question. Clark recapitulates this part of the holding but never explains its legal meaning: it means, technically, that Indian affairs are nonjusticiable, that is, that judges will not review congressional action in this field at all because control over this field is committed to congressional discretion. The Court reached this conclusion on the racist ground that Indians were helpless and inferior and therefore needed the unrestricted guidance of their guardian, Congress (see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–68 [1903]). In recent years, the Supreme Court has abandoned this view: Indian affairs are no longer a political question (see *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248–50 [1985]).

The other reason for rejecting the Sanctity of Treaty claim is, however, more compelling: the most recent word of Congress on a subject, whether expressed in statute or treaty, controls (see *Lone Wolf*, 187 U.S. at 565–66). The basis for this last-in-time doctrine is simple—democracy. A past Congress may not restrain a present Congress, because to do so would be to restrict the present will of the majority. To do that, we must pass a constitutional amendment; ordinary legislation or treaties will not do. Congress generally should not abrogate its treaties, to be sure, but if it does, the Court may not stop it without great damage to the democratic process. As a result, long before *Lone Wolf* came down, the Court had held that Congress may abrogate treaties in general. *Lone Wolf* simply applied this general rule to Indian treaties in particular. There are, then, strong reasons for the last-in-time rule, and it remains in effect today (see *Sioux Nation*, 448 U.S. at 410–11, n. 27). One may reject these reasons generally or particularly in the field of Indian affairs, but unhappily Clark never discusses them, nor does he make any attempt to situate *Lone Wolf* in the area of general treaty doctrine.

With regard to the Kiowas’ Just Compensation claim, the Court found itself faced with two legal ideas that were somewhat in opposition. On

the one hand, the federal government is under a fiduciary duty to manage the tribes' property in their best interest. As a result, the federal government has the right to change the form of the Indians' property (e.g., selling some of the land to buy livestock), so long as that decision is made for the good of the Indians. On the other hand, under the Fifth Amendment of the U.S. Constitution, the federal government is forbidden to take Indian land without just compensation. In short, the federal government may manage the tribes' land but not take it. Unfortunately, it is not always easy to tell the difference, and we need some guidance to make the determination in individual cases (see *Sioux Nation*, 448 U.S. at 407–9).

In *Lone Wolf*, the federal government had given the tribes some money in exchange for the land, but there was a serious allegation that the money was inadequate and that the deal was a taking in disguise, not an effort to manage the land in good faith. The Kiowas' case here was quite strong, and there was a hope that the Court might have found for them on this claim. The *Lone Wolf* Court, however, perfunctorily rejected the claim, on the grounds that the Court "must presume that Congress acted in perfect good faith" and that Indian affairs were a political question, immune from judicial review (see *Lone Wolf*, 187 U.S. at 568). Again, the modern Court has rejected this rule: it has promised, instead, to review carefully every act of Congress to ensure that Congress acted as a good fiduciary (see *Sioux Nation*, 448 U.S. at 414–16).

Unfortunately, almost none of this analysis appears in Clark's book. He never mentions the fiduciary doctrine or considers its tension with the Just Compensation clause. As a result, he fails to recognize the fundamental issue here: how do we distinguish between federal management and takings of Indian land? For the same reason, he also fails to recognize that *Lone Wolf* is legally so egregious primarily because it presumed Congressional good faith in the management of Indian land—not because it allowed Congress to abrogate Indian treaties. Finally, he fails to recognize that the Just Compensation claim would have secured only more money for the tribe, not their land.

Indeed, Clark's whole description of *Lone Wolf* ignores basic legal distinctions. He begins with the Court's observation that Congress has the power to abrogate (relevant to the Sanctity of Treaty doctrine). Without pause—as if he is discussing the same issue—he then asserts that *Lone Wolf* set up a "good faith effort" test: the Just Compensation clause requires only that Congress try in good faith to give the tribes market value (71). In fact, *Lone Wolf* did not set up such a test; rather, it *presumed* good faith. Modern cases do set up a "good faith" test, and Clark would appear to

be reading these back into *Lone Wolf*. In any event, this whole discussion concerns the Just Compensation clause, not the Sanctity of Treaty claim.

Again without pause, Clark goes back to the Sanctity of Treaty claim to mention the last-in-time rule, but within the same paragraph he has returned to Just Compensation concerns: he asserts that the *Lone Wolf* Court held that “there was really no treaty violation” (the Sanctity of Treaty issue) because the federal government was merely managing the property (the Just Compensation issue). He then quotes from the Court’s holding that Indian affairs fall under the Political Question doctrine because Indians are inferior and helpless. At this point, he asserts that the Court confronted an irony: because a majority of the tribal members signed the 1892 agreement, it would be undemocratic to reject it, even though the 1867 treaty required three-quarters agreement. The Court’s response to this troubling issue, according to Clark, was to take refuge in the Political Question doctrine. In fact, however, there is no evidence at all that the justices were troubled by any such irony. In the body of the opinion, they never mention that a majority of the tribe had signed the agreement, nor do they ever reveal any discomfort with the thought of flouting the will of a tribal majority (71–72).

Lone Wolf v. Hitchcock, to be sure, is not an easy case to understand, but all the foregoing is basic black letter law in this field. The failure of this slim volume to reproduce accurately the holding and reasoning of the case must therefore be accounted a serious deficiency. That deficiency is all the greater because Clark maintains a constant tone of outrage toward the *Lone Wolf* Court. Outrage is appropriate in my view, but if we are going to be outraged, we should first seek to understand what the Court really did and to enter the justices’ mental universe long enough to get some sense of the terrain.

Ultimately, however, the weakness of this work reflects the failure of Indian law itself. Federal Indian law controls the lives of many tribal communities to a unique degree, and yet Indian law is uncommonly inaccessible, not only to the general public but even to lawyers. As long as Indian law has this arcane, forbiddingly technical quality, tribal members will not generally be able to understand the rules governing their lives. As a result, they will remain disempowered, denied control of their own future. Sadly, neither courts nor Congress nor Indian law commentators have done much to render the field more accessible to nonlawyers. Clark’s errors are therefore somewhat understandable, and the custodians of the legal system must bear some of the blame for them. Nonetheless, they are errors, and they are therefore a part of the problem. This work does not help make

Indian law more accessible; it adds to the confusion. With the best intentions in the world, Clark protests the disempowerment of Indian tribes, but he inadvertently contributes to it.

Southern Cheyenne Women's Songs. By Virginia Giglio. (Norman: University of Oklahoma Press, 1994. xxi + 243 pp., preface, introduction, illustrations, maps, figures, song transcriptions, photographs, appendixes, glossary, bibliography, index. \$29.95 cloth.)

Catherine Price, *Palo Alto College*

In *Southern Cheyenne Women's Songs*, Virginia Giglio demonstrates that Cheyenne women have taken a leadership role both in preserving traditional Cheyenne songs and in experimenting with new musical expressions. Giglio is careful to remind the reader that the completion of this fascinating and scholarly work on Cheyenne music could not have been possible without the expertise of her Cheyenne friends, talented women such as Diane Hawk and Joan Swallow. Deeply respectful of the Southern Cheyenne's belief that all musical expression has a sacred center, Giglio was careful to ensure before proceeding that her research project would be acceptable to the Southern Cheyenne people. Moreover, the author wove historical and cultural sketches into the fabric of song analysis. "I didn't want to know only about the music," she writes, "I wanted to know the people" (xviii). Thus the reader follows the Cheyenne people from some of the earliest encounters with whites in 1680 to the modern-day powwow.

Armed with a copy of Frances Densmore's *Cheyenne and Arapaho Music*, drawn from Densmore's research among the Southern Cheyenne in 1935, Giglio traveled to several Oklahoma Cheyenne communities nearly sixty years later to record a variety of songs customarily sung by Cheyenne women to their children, during hand games and "giveaways," at ceremonies to honor male and female veterans, and during spiritual gatherings. Furthermore, for each of the thirty-two songs chosen for analysis, Giglio includes a musical transcription, the Cheyenne lyrics as they would be spoken and as they are sung, followed by both literal and free translations of the song in English.

Through her research, Giglio succeeded in questioning the assumptions of earlier scholars. Frances Densmore, for instance, concluded that the Cheyenne people did not sing lullabies to their babies, "as the crooning to little children is not dignified by the name of singing" (85). Yet Giglio recorded several popular lullabies, including one that consultant Bertha Little Coyote sang to her own son in 1931. In addition, Giglio analyzed